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From: [REDACTED]

Sent: Monday, September 30, 2013 10:40:33 AM

To: [REDACTED]

Cc:

Bcc:

Subject: FW: Request for advice - **Possible short statute-

We have looked into the questions you asked below with respect to the taxpayer's protective claim for refund submitted in the above-referenced matter. Your questions have been appropriately coordinated and here are Counsel's responses:

1) [REDACTED] has looked into the question below regarding whether the Form 1040 submitted by the taxpayer for the [REDACTED] tax year is a return and whether the statute of limitations on assessment began to run for the [REDACTED] tax year. In the protective claim for refund filed with the Service, the taxpayer's representative included a tax return for the [REDACTED] tax year that was labeled "PROTECTIVE CLAIM OF REFUND" and "AS AMENDED". In the cover letter submitted with the protective claim for refund, the taxpayer's representative stated, in part, that (1) the taxpayer did not concede that he was a U.S. resident for the [REDACTED] tax year and (2) the [REDACTED] return submitted with the protective claim for refund was "not meant for immediate filing, but as support for the protective claim for refund". After receiving the protective claim for refund, the Service processed the attached Form 1040.

Based on the facts provided below and the supplemental information that has been provided, we have concluded that the Form 1040 attached to the taxpayer's protective claim for refund for the [REDACTED] tax year is not a return and the statute of limitations on assessment has not started to run with respect to the taxpayer's [REDACTED] tax year. Based on the submission from the taxpayer's representative, the "As Amended" [REDACTED] Form 1040 submitted by the taxpayer was not intended to be the taxpayer's filed tax return. As noted, the [REDACTED] Form 1040 that was submitted was marked "Protective Claim of Refund" and "As Amended". In addition, the submitted Form 1040 was not signed by the taxpayer (or the taxpayer's representative, for that matter). In *Beard v. Commissioner*, 82 T.C. 766 (1984), aff'd 793 F.2d 139 (6th Cir. 1986), the Tax Court held that a valid return is a document that: (1) purports to be a return, (2) is executed under penalties of perjury, (3) reports sufficient data to calculate the tax liability, and (4) constitutes an honest and reasonable attempt to satisfy the requirements of the law. The signature requirement comes from section 6061 and section 6065. Section 6061 provides that returns are required to be signed in accordance with forms or regulations prescribed by the Secretary. Section 6065 provides, in part, that any return required to be made under any internal revenue provision shall contain a written declaration that it is made under penalties of perjury. A return without a signature and

declaration that it is made under penalties of perjury remains an invalid return even if the Service processes the return. See *Ulicher v. Commissioner*, T.C. Memo. 2002-55. Thus, the failure to sign a form in accordance with section 6061 and 6065 is the equivalent of the failure to file a return. See *Schroeder v. Commissioner*, T.C. Memo. 1986-583. Since the Form 1040 submitted as part of the protective claim for refund does not have the signature, it fails the Beard test and is not a valid filed return. Accordingly, the statute of limitations on assessment under section 6501 has not started with respect to the taxpayer's tax year.

2) has looked into the issue addressed by question #2 below, whether the IRS can hold in abeyance the taxpayer's protective claim until the examination of the taxpayer's and tax years has concluded.

The taxpayer may file a protective claim in this context. IRM 21.5.3.4.7.3, as well as several other IRM provisions, basically define a protective claim as one based on some kind of expected change in the law or the outcome of pending litigation. Case law expands this definition to encompass a situation involving a pending tax audit, the outcome of which will determine whether the taxpayer is entitled to a claimed refund. See *New England Elec. System v. United States*, 32 Fed. Cl. 636, 642 (1995) (tax need not yet be assessed for claim for refund to be appropriate). See also *PALA, Inc.. Employees Profit Sharing Plan and Trust Agreement v. United States*, 234 F.3d 873, 880 (5th Cir. 2000); *AmBase Corp. v. United States*, F.3d , 2013 WL 4779643 (2d Cir., September 9, 2013); IRS CCA 201136021 (September 9, 2011) (taxpayer awaiting determination from IRS may submit protective refund claim while determination is pending to avoid having claim barred by expiration of period for filing refund claim). If the taxpayer is not permitted to file a protective claim in this case, he – like the taxpayers in protective refund claim situations – will not have the ability to reduce his liability if the IRS ultimately determines that taxes are owed for and the carryback limitations period has expired. Accordingly, the IRS can hold the protective claim in abeyance “indefinitely” – i.e., until the examination has concluded – and determine the validity of the claim at the appropriate time.

3) We contacted regarding your question below with respect to the NOL carryback. After speaking with , it is my understanding that he has already spoken to you with respect to this matter.

We hope this adequately addresses your questions. If you need additional assistance, please just let me know.

Thanks.